

1  
2  
3  
4  
5  
6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
8 AT TACOMA

9 SAM DONAGHE,

10 Plaintiff,

11 v.

12 PATRISHA LASHWAY, KEVIN  
13 QUIGLEY, et al.,

14 Defendants.

CASE NO. 3:16-cv-05973 RJB

ORDER ADOPTING REPORT  
AND RECOMMENDATION

15 THIS MATTER comes before the Court on the Report and Recommendation of  
16 Magistrate Judge J. Richard Creatura. Dkt. 37. The Court has reviewed the Report and  
17 Recommendation; objections filed by Plaintiff (Dkt. 39); response to Plaintiff's objections filed  
18 by Defendants (Dkt. 40); pleadings relating to the two underlying motions, Defendants' Motion  
19 to Dismiss (Dkt. 26) and Plaintiff's Motion to Dismiss (Dkt. 35); and the remainder of the file  
20 herein. The Court will adopt the Report and Recommendation, which recommends dismissal for  
21 claims except those challenging his conditions of confinement. This Court adds the caveat that,  
22 except for the 5<sup>th</sup> Amendment/Double Jeopardy claim, dismissal must be without prejudice and  
23 with leave to amend. The Court also adds the following additional analysis to address Plaintiff's  
24 discrete objections.

1       A) Objection to Defendants’ suggested comparison of Plaintiff to a pretrial detainee.

2       Plaintiff objects to Defendants’ characterization of Plaintiff as a pretrial detainee. The  
3       objection is without merit for two reasons. First, the objection addresses Defendants’  
4       characterization of Plaintiff, which falls outside the purview of a proper objection. Objections  
5       should address parties’ substantive issues with the R&R. Second, this Court adopts the law  
6       discussed by the R&R, including the R&R’s observation that the pending civil commitments are,  
7       in fact, at the pretrial stage, which has bearing on the ways that Defendants may—or may not—  
8       detain Plaintiff. *See* Dkt. 37 at 7-10. Characterizing Plaintiff as a pretrial detainee is accurate.  
9       Although Plaintiff is not incarcerated, his freedom has been curtailed due to the pending civil  
10      commitment proceedings. *See Sharp v. Weston*, 323 F.3d 1166, 1172-73 (9<sup>th</sup> Cir. 2000); *Jones v.*  
11      *Blanas*, 393 F.3d 918, 931 (1981).

12      B) Objection to R&R use of *Bell v. Wolfish*, 441 U.S. 520, 554 (1979).

13      Plaintiff’s objection to the R&R’s reliance on *Wolfish* is noted, but it is without merit.

14      The R&R, which this Court adopts, states:

15             The [*Jones v. Blanas*, 393 F.3d at 931] court also noted that ‘an individual detained under  
16             civil process—like an individual accused but not convicted of a crime—cannot be  
17             subjected to conditions that ‘amount to punishment.’” [*Jones v. Blanas*, 393 F.3d 918,  
18             932 (9<sup>th</sup> Cir. 2004)] (quoting *Bell v. Wolfish*, 441 U.S. 520, 536 (1979)).

19      The reference to *Wolfish* is proper citation to binding authority. *Wolfish* is still good law, so  
20      Plaintiff’s argument is unavailing.

21      C) Objection to dismissal of 5<sup>th</sup> Amendment/double jeopardy claim.

22      Plaintiff opines that the “exact same” “historical records . . . [used for] criminal  
23      prosecution” are being used “for the purpose of depriving liberty a second time classed as a  
24      sexually violent predator (SVP).” Dkt. 39 at 4. The Supreme Court of the United States squarely  
25      rejected challenges to Washington’s civil commitment statutes on the basis of double jeopardy.

1 *Selig v. Young*, 531 U.S. 250, 263 (2001). Allowing Plaintiff to amend this claim would be futile,  
2 so dismissal should be with prejudice. As noted by the R&R, the bar against the double jeopardy  
3 claim does not preclude Plaintiff from challenging the conditions of confinement as a substantive  
4 due process claim.

5 D) Objection to dismissal of *Bounds* claims.

6 Plaintiff objects to the R&R's reliance on *Lewis v. Casey*, 518 U.S. 343 (1996). *Lewis*  
7 held that in the context of a *Bounds* claim, the plaintiff must show an actual injury, which is  
8 "actual prejudice with respect to contemplated or existing litigation." Dkt. 37 at 14. Plaintiff  
9 requests that he be permitted to conduct discovery to establish "imminent harm." However, the  
10 R&R recommended dismissal for failure to state a claim in his written complaint. Dkt. 37 at 16.  
11 The law requires a statement of claim which, if adequate, is the foundation for discovery to prove  
12 the claim alleged. The law does not allow discovery without that foundation. Permitting Plaintiff  
13 to conduct discovery on the *Bounds* claim is not warranted, because even if Plaintiff proved all  
14 the allegations in the Complaint he would not be entitled to recovery. The Complaint does not, as  
15 a matter of law, state a claim upon which relief can be granted. As the R&R recommends, the  
16 *Bounds* claims should be dismissed, but dismissal should be without prejudice and with leave to  
17 amend.

18 E) Objection to dismissal of destruction of computer (and Due Process) claim.

19 Plaintiff argues that the Complaint sufficiently alleges a Due Process claim under the  
20 theory that defendants destroyed his computer in violation of a specific policy, SCC Policy 212.  
21 Dkt. 39 at 10, 11. *See* Dkt. 1-1 at ¶4.68. The R&R properly recommends that the Complaint be  
22 permitted to proceed to the extent that the facts surrounding destruction of Plaintiff's computer  
23 relate to conditions of confinement. Dkt. 37 at 24. The R&R correctly notes that even if, as  
24

1 alleged, Plaintiff's computer was destroyed in violation of an SCC policy, "state department  
2 regulation do not establish a *constitutional* violation." Dkt. 37 at 25, citing to *Cousins v. Lockyer*,  
3 568 F.3d 1063 (9<sup>th</sup> Cir. 2009) (citations omitted). Dismissal should be without prejudice and  
4 leave to amend, because the facts, if pled differently, could potentially state a claim for a  
5 constitutional violation or a state law tort claim.

6 F) Objection to dismissal of defendants pled under theory of respondeat superior.

7 Plaintiff defends his argument—rejected by the R&R—that two supervisors, Kevin  
8 Quigley and Patrisha Lashway, could be liable under a theory of respondeat superior. Dkt. 39 at  
9 7. Resolving the legal issue raised by Plaintiff's objection is of no importance to the issue of  
10 whether claims should be dismissed against Mr. Quigley and Ms. Lashway. The R&R  
11 recommends denying dismissal of Ms. Lashway on other grounds, namely, because the  
12 Complaint alleges personal conduct by Ms. Lashway, that she "knew of the [constitutional]  
13 violaitons and failed to prevent them." As to Mr. Quigley, who was named as a "former  
14 supervisor," the R&R recommended dismissal on Eleventh Amendment grounds. Dkt. 37 at 19,  
15 21, 22.

16 Nonetheless, addressing the substance of Plaintiff's objection, Plaintiff's argument is not  
17 supported by the law. *See Iqbal*, 556 at 676. To the extent that Plaintiff seeks damages from Mr.  
18 Quigley and Ms. Lashway under 28 U.S.C. §1983, alleging supervisory liability under an agency  
19 theory is insufficient. Instead, the complaint must allege a violation, by a defendant personally,  
20 of governmental ordinance, policy, practice, or custom that is the moving force behind the  
21 constitutional violation. *Monell v. Dep't of Soc. Servs. of the City of New York*, 436 U.S. 658,  
22 694 (1978).

G) Objection to dismissal of allegations against defendants in their personal and individual capacity.

Plaintiff argues that, contrary to the R&R’s finding, “clearly at this stage of pleadings [he] need not specifically delineate how each named Defendant individually or personally contributed to any violation of his constitutional rights.” Dkt. 39 at 8. The R&R dismissed the request for damages without prejudice as to all individually-named defendants because the Complaint repeats the same factual allegations—and then attributes liability—“to each enumerated employee, without any explanation as to how each person participated.” Dkt. 37 at 24.

This Court adopts the R&R’s reasoning, which relied on *Leer v. Murphy*, 844 F.2d 628 (9<sup>th</sup> Cir. 1988), for the rule that pleadings must allege causation that is “individualized and focus[ed] on the duties and responsibilities of each individual defendant whose acts or omission are alleged to have caused a constitutional deprivation.” Dkt. 37 at 23. Concededly, *Leer* analyzed a motion for summary judgment, whereas in this case there is pending a motion to dismiss for failure to state a claim. However, even taking all Plaintiff’s allegations as true, the Complaint does not allege a sufficient basis for recovery against individual defendants. The Complaint must allege “that each Government-official defendant, through the official’s own individual actions, has violated the Constitution,” *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009), which the Complaint has not done. Dismissal should be without prejudice with leave to amend, because if Plaintiff particularizes the complaint to named individuals, he may be able to state a claim.

\* \* \*

1        THEREFORE, the Court **HEREBY ORDERS:**

2        (1) The Court adopts the Report and Recommendation (Dkt. 37).

3        (2) Defendants' Motion to Dismiss (Dkt. 26):

- 4            ■ Conditions of confinement claims: GRANTED IN PART and DENIED IN  
5            PART:

6            ○ Official capacity: To the extent the conditions of confinement claims  
7            are alleged against persons named in their official capacity, the request  
8            for damages is dismissed with prejudice on Eleventh Amendment  
9            grounds, but the request for declaratory or injunctive relief may  
10           proceed.

11           ○ Individual and personal capacity: To the extent conditions of  
12           confinement claims are alleged against persons named in their  
13           individual and personal capacity, claims are dismissed without  
14           prejudice for failure to state a claim, with leave to amend.

- 15           ■ Double Jeopardy/Fifth Amendment claim: GRANTED. The claim is  
16           dismissed with prejudice.

- 17           ■ *Bounds* claims: GRANTED. The claims are dismissed without prejudice for  
18           failure to state a claim, with leave to amend.

- 19           ■ Claim of improper destruction of property: Defendants' motion is  
20           GRANTED. The claim is dismissed without prejudice for failure to state a  
21           claim, with leave to amend.

22           Any amended pleadings must be filed before **July 1, 2017.**

1 (3) Plaintiff's Motion to Dismiss Defendant Carol Scott (Dkt. 35) is GRANTED.

2 Defendant Carol Scott is dismissed.

3 (4) This matter is re-referred to Magistrate Judge J. Richard Creatura.

4 **DATED** this 7th day of June, 2017.

5 

6  
7 ROBERT J. BRYAN  
8 United States District Judge  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24